

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

**DONNA CURLING, ET AL.,
Plaintiffs,**

v.

**BRIAN KEMP, ET AL.,
Defendants.**

Civil Action No. 1:17-CV-2989-AT

**COALITION PLAINTIFFS' REPLY IN SUPPORT
OF MOTION TO ISSUE SUBPOENA DUCES
TECUM**

Plaintiffs Coalition for Good Governance, William Digges III, Laura Digges, Megan Missett, and Ricardo Davis (the “Coalition Plaintiffs”) file this Reply in Support of its Motion to Issue Subpoena Duces Tecum [Doc. 230] requesting production of two DRE machines used in early voting at South DeKalb Mall.

In their Brief in Opposition to the Motion [232-1], the DeKalb County Board of Elections (former Defendants) (“DeKalb”) state that the two machines had been sequestered after counsel for the Coalition Plaintiffs had alerted DeKalb election officials that an erroneous electronic ballot was issued to a voter in early voting on May 4, 2018. DeKalb further denies any alteration of electronic records in the DRE memory when the machines were taken out of sequestration so that their memory cards could be used to tabulate the final votes on May 22, 2018, and again in the recount on

June 8, 2018. Even if there was no spoliation of this evidence after they were used in early voting, however, the question still remains as to the cause of the ballot error in the first place, and the Coalition Plaintiffs' request for discovery of the machines remains reasonable and appropriate.

As to the cause of the ballot error, the DeKalb states that they have investigated the issue and determined that the "most likely" reason – the "most probable explanation" – for the ballot error was human error in the creation of the electronic ballot for the individual voter and not "the functionality, accuracy or reliability of either the memory card or DRE machines themselves." [Doc. 232-1 at 5, 6].

Yet the DeKalb's remaining uncertainty as to the actual cause of the error underscores the need for a rigorous forensic examination, particularly in light of all the other problems and security failures these machines and related components of the system have encountered. The determination that human error was "most likely" the cause is little comfort.

Separately, DeKalb's alarming statement that the continued use of these DRE machines in upcoming elections would not destroy electronic records on the machines is not only inaccurate, it also suggests that DeKalb may be continuing their practice of ignoring Coalition Plaintiffs' specific request for electronic records preservation and failing to preserve such records including these DRE machines in the state they were in when preservation requirements began. This treatment of vulnerable and sensitive

electronic records further demonstrates the compelling need to deliver the equipment to Coalition Plaintiffs to avoid further risk of spoliation.

The Coalition Plaintiffs' subpoena is narrowly targeted to the two specific machines at issue, is not burdensome, and remains very reasonable under the circumstances. *PowerPak International, LLC v. B.F. Machinery, Ltd.*, 2016 WL 9450407 (N.D. Ga. 2016) (expedited discovery should be permitted where proposed discovery is reasonable in scope, tailored to the needs for expedited treatment, and seeking evidence in the opponent's exclusive possession).

The Coalition Plaintiffs' motion should be granted.

Respectfully submitted this 17th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document has been prepared in accordance with the font type and margin requirements of LR 5.1, using font type of Times New Roman and a point size of 14.

/s/ Bruce P. Brown

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CERTIFICATE OF SERVICE

This is to certify that I have this day caused the foregoing REPLY IN SUPPORT OF MOTION TO ISSUE SUBPOENA DUCES TECUM to be served upon all other parties in this action by via electronic delivery using the PACER-ECF system.

This 17th day of July, 2018.

/s/ Bruce P. Brown

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